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IN THE

Supreme Court of the United States

October Term, 1966

No. 747

SHERIDAN CREATIONS, INC.,

Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR REHEARING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that the petition for a writ of certiorari be reheard and that a writ be issued to review a decree of the United States Court of Appeals for the Second Circuit.

Statement of Jurisdiction

The petition for a writ of certiorari in this matter was denied on January 9, 1967. An order of this Court, dated February 3, 1967, extended petitioner's time to petition for a rehearing to and including February 15, 1967.

Ground on Which Writ of Certiorari Was Originally Sought

The original petition was sought on the ground that the majority decision of the Court below violated the policy of the National Labor Relations Act, was in conflict with the statutory language, and was contrary to other decisions, including a decision of the Supreme Court of the United States.

Grounds on Which Petition For Rehearing Is Sought

The instant petition is sought on these substantial grounds, not previously presented:

1. The action of the National Labor Relations Board was based upon a determination of law, and the Board misconceived the law.

2. The decision of the National Labor Relations Board fails to comply with the requirements of the common law and of the Administrative Procedure Act.

3. The adoption and application of the *per se* rule approach to the instant case and like cases is improper, but even if it were held to be proper the rule should have been applied prospectively, particularly in a case where the decision would have been otherwise if the case-by-case approach had been followed and where no mischief resulted from the petitioner's conduct.

Statute Involved

The Administrative Procedure Act, as amended, 60 Stat. 242 (5 U.S.C. Section 1007).

"In cases in which a hearing is required to be conducted in conformity with Section 1006 of this title . . ."

* * *

"(b) . . . All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Reason for Rehearing the Petition and Granting the Writ

The decision of the National Labor Relations Board in this case is not only substantively incorrect, but it also fails as a piece of quasi-judicial craftsmanship to meet the legal standards established for such works and set forth in the Administrative Procedure Act.

The decision reveals that the three member panel of the Board responsible for its authorship misconceived the law on which it professed to rely. For that reason the panel thought its ruling was based on "well settled" law. As a consequence, its decision is unsupported by any reasoning and was reached without the consideration of either all the interests involved or of possible alternative rulings. Such consideration is necessary to meet the legal standards applicable to the process of agency rule making.

In short, a panel of the Board wrote a landmark decision establishing and applying a new rule without even knowing that it did so.

This case should be remanded with a direction that it be reconsidered in light of the true state of the law. *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80 (1943).

POINT I

The National Labor Relations Board specifically rested its decision on what it stated to be "well settled" law. The Board was clearly incorrect as to the law and, therefore, the matter should be remanded.

This case presents a direct parallel to *S. E. C.* v. *Chenery Corporation*, 318 U. S. 80 (1943). In the *Chenery Corporation* case the Supreme Court remanded the matter to the Securities Exchange Commission after finding that the Commission had explicitly based its decision on its understanding of the law and the further finding that the Commission had misconceived the true state of the law.

This Court wrote:

> "Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked." 318 U. S. 89.

The Court then examined the pertinent law and held:

> "The cases upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order." 318 U. S. 89.

As in the instant case, the argument made before the courts by the S. E. C. to sustain its order shifted to a policy ground never enunciated in its decision. This Court commenting thereon wrote:

> "But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action were based." 318 U.S. 92. And:
>
> "The Commission's action cannot be upheld merely because findings *might have been made* and considerations disclosed which would justify its order

as an appropriate safeguard for the interests protected by the Act." [Emphasis added.] 318 U. S. 94.

Finally this Court held:

> "But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." 318 U. S. 94.

An examination of the law on which the Board in this case specifically stated it was relying reveals that it "misconceived the law."

The crux of the decision of the NLRB is found in these two sentences:

> "Although the Respondent [Sheridan] evinced an intent to withdraw from multiemployer bargaining after negotiations for renewal of the multiemployer contract had begun and before agreement had been reached, the evidence is clear that the Respondent neither sought nor obtained union consent to such withdrawal. In the absence of such consent, it is well settled now that an attempted withdrawal at that stage of negotiations is neither timely nor effective." (148 NLRB 1505; R. 5-6)

The only citation in support of the above is *The Kroger Co.*, 148 NLRB 569, decided only thirty-five days before *Sheridan*. *Kroger* is fundamentally distinguishable from *Sheridan* and an exhaustive examination of the relevant law demonstrates that precedent is in support of the minority decision of Chief Judge Lumbard in this case, not in support of the decision of the Board.

The *Kroger* case came before the full five member Board. Two members dissented. The three member majority in the *Kroger* case happened to constitute the three member panel in the *Sheridan* case. But for the chance of the composition of the panel, the *Sheridan* case might have been decided differently. In any event, the

"well settled" law cited was a 3-2 decision of 35 days' standing.

Moreover, a further reading of *The Kroger Co.* decision shows that it is clearly distinguishable. In *Kroger* it was admitted that the union represented Kroger's employees at the time Kroger withdrew from the multi-employer unit. In *Sheridan* it is admitted that Sheridan's employees were not represented by the union when Sheridan withdrew from the multi-employer unit.

An examination of all relevant National Labor Relations Board decisions clearly demonstrates that the panel's statement of the law was incorrect.

The Board contrary to its statement that it was following "well settled" law, had never applied a hard and fast *per se* rule to determine the timeliness of a withdrawal from a multi-employer unit. For example, the Board in *Greater Peoria Restaurant Association*, 131 NLRB 198 (1961) adopted the decision of a trial examiner who wrote at page 209:

> "This review of the cases dealing with timeliness of withdrawal suggests an absence of any pattern or formula that has been consistently applied. On the contrary, I am left with the distinct impression that the factor of timeliness of withdrawal is to be applied on an *ad hoc* basis, to be determined by the peculiar circumstances of the case at hand.[26]"

Footnote 26 reads:

> "In *Retail Associates, Inc.*, 120 NLRB 388, the Board also considered the complications arising from withdrawal from multi-employer bargaining. This case became the subject of considerable court litigation (42 LRRM 2031; 43 LRRM 2004; 43 LRRM 2029) and culminated in the Board's order of December 5, 1958, *vacating* its Decision and Direction of Election insofar as they hold that the appropriate bargaining unit is a multi-employer unit. Because

this latest order has thus cast doubt upon the continued existence of the original decision and because the Board itself has refused to rely upon its decision in several instances (*Detroit Window Cleaners Union Local 139, etc.*, 126 NLRB 63; *Marcus Trucking Company, Inc.*, 126 NLRB 1080; *General Teamsters Local Union No. 324, etc.* (*Cascade*), 127 NLRB 488, *Cosmopolitan Studios, Inc.*, 127 NLRB 788) I do not believe it necessary to burden this report with further references to the case." (Emphasis in original.)

It was *Retail Associates Inc.*, 120 NLRB 388 (1958), on which the government relied in its brief to this Court on the original petition for a writ of certiorari.

The correct state of the law, i.e. that Board decisions on this issue were made on an ad hoc, case-by-case basis, was recognized a few months *after* the *Sheridan* Board decision in the case of *Tulsa Sheet Metal Works, Inc.*, 149 NLRB 1487 (1964). In that case, it should be noted, the Board panel of members included the two members who dissented in the *Kroger* case, *supra*. In *Tulsa Sheet Metal Works, Inc.* the Board adopted the findings and conclusions of the trial examiner who wrote, at page 1499:

"No decisional codification has been attempted precisely defining what constitutes an appropriate time for effecting a timely withdrawal from group bargaining.[22] However, precedent has established guidelines. Thus, withdrawals made before the commencement of negotiations but after the expiration of a contract have been found timely,[23] however, untimely are efforts to withdraw after group bargaining has produced agreement upon terms of a new collective-bargaining contract.[24] *The Board on the other hand, has not found untimely all withdrawals effected after the commencement of negotiations but before the consummation of a new agreement* [25] nor, has it forced an employer which has not withdrawn from group bargaining to execute an agreement achieved by virtue of union-initiated individual bargaining, destructive of the multi-employer unit.[26]

> However, beyond these generalizations, a careful analysis of precedent reveals that variations in facts and circumstances preclude a *per se* approach, and demonstrates that the ultimate determination with respect to timely withdrawal must turn upon a discriminating evaluation of *all* attendant facts and circumstances.[27]'' (Emphasis added.)

Indeed, an exhaustive analysis of all the cases relating to withdrawal from a multi-employer unit shows that the Board decided each matter on a case-by-case basis after analyzing all of the facts. As the trial examiner in the *Sheridan* case found, in other cases the Board would prohibit withdrawal only if it found ''evidence of bad faith in the party's decision to withdraw'' (148 NLRB 1514, R: 25). And in this case the trial examiner recommended dismissal of the complaint because ''the element of bad faith on the part of the Respondent (Sheridan) is still missing from the General Counsel's case.'' (148 NLRB 1514, R. 27).

The analysis of the law by counsel for the petitioner is supported in all instances by the Law Reviews which have commented on this case to date. (New York University Law Review and Texas Law Review are also preparing notes or comments.) They all conclude that the National Labor Relations Board based its decision on a misconception of the law.

Thus, 35 George Washington Law Review (October 1966) at page 135 states:

> ''Judge Lumbard's opinion follows precedent more closely than the majority decision which goes beyond previous Board policy; the Board has never consistently held that withdrawal is ineffective solely on the basis of its occurring after the commencement of negotiations.''

42 Notre Dame Law Review (October 1966) at page 123 states:

> "Thus, an analysis of the cases upon which the Second Circuit relies in *Sheridan* shows that the Board itself has never adopted the per se approach."

The January 1967 University of Pennsylvania Law Review comment at footnote 37 reads:

> "An examination of the cases which the Board cites as authority for prior use of the per se withdrawal rule shows that it was never more than an alternative ground for the decision, and in some cases cited it was never mentioned."

Chief Judge Lumbard, in his dissenting opinion, also distinguished the cases relied on by the National Labor Relations Board.

Most surprising of all is that a search of all the cases involving withdrawal from a multi-employer unit reveals that in the one or possibly two cases which are directly in point (*Moscow Idaho Seed Co.*, 107 NLRB 107 (1953); *See, Bearing & Rim Supply Co.*, 107 NLRB 101 (1953)) the Board approved the employer's withdrawal from the multi-employer unit. Consequently, the Board's law was precisely the reverse of what the panel in the *Sheridan* case conceived it to be.

As this Court said in *S. E. C.* v. *Chenery Corporation, supra*: " . . . an order may not stand if the ageney has misconceived the law." (318 U. S. 94) This matter should be remanded.

POINT II

The decision of the National Labor Relations Board failed to satisfy the requirements of the common law and of the Administrative Procedure Act in that the Board did not articulate any reason for adopting and applying a new approach to an old recurring problem.

It is clear *why* the Board gave no supporting reason for the adoption and application of a new approach to a recurring problem. It misconceived the law, thought it was following "well settled" principle, and considered explication unnecessary. But to understand the reason for the failure is not to render it any less a failure.

The Administrative Procedure Act (5 USC Sec. 1007 (b)) requires that "All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record . . ."

An examination of the Board's decision in this case shows a complete absence of any reason for its adoption and application of a per se rule in place of the case by case approach and a failure to engage in the balancing of competing interests. The record is devoid of any evidence to support the post-decision reason proposed by the Board's counsel in an attempt to justify the Board's decision.

As the January 1967 University of Pennsylvania Law Review comment states:

> "In view of a reviewing court's obligation to refuse to uphold an administrative rule where there has been a failure by the agency either to engage in the proper balancing or to explicate the balance upon which the rule was adopted, it would seem that the Second Circuit should have remanded *Sheridan* to allow the Board to apply the appropriate standards."

The Law Review comment mentions many of the various and sometimes competing interests which the Board failed to consider and which will be presented to this Court should certiorari be granted.

That the Board failed to support its decision to change from the case by case method to the per se approach is clear from a reading thereof. That such failure renders the decision inadequate under the requirements of the Administrative Procedure Act is equally clear from the cases discussing and applying that Act. *Austin* v. *Jackson*, 353 F. 2d 910 (C. A. 4, 1965). *See, S.E.C.* v. *Chenery Corporation*, 332 U. S. 194, 196-197 (1947).

The Administrative Procedure Act is a codification of due process requirements developed under the common law. *See, United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499 (1935).

A leading case ordering the remand of an agency decision and order for failure of the decision to justify its action is *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1961). In that case the Interstate Commerce Commission issued its standard order when existing services were inadequate to serve the public interest. This Court held that the special facts of the case required that "the choice of the . . . remedy may not be automatic; it must be rational and based upon conscious choice" among statutory policies "and the other opposing interests." 371 U. S. 166-167.

In *Burlington Truck Lines, Inc.* the Commission's counsel tried to do what the Board's counsel did in this case: he attempted to justify the Commission's action with a rationalization which the Commission did not use. The Court wrote: "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; . . ." 371 U. S. 168. It held, moreover, that the attempted justification failed because there was no substantial evidence in the record to support the finding on which the rationalization was based. 371 U. S. 169. Likewise, in *Sheridan*,

there is no substantial evidence in the record to support a finding to buttress the post-decision rationalization that, absent a *per se* rule applied as in the instant case, collective bargaining would be disrupted. Indeed, the actual facts of this case demonstrate that collective bargaining was not disrupted.

In *Burlington Truck Lines, Inc.* this Court was concerned because the agency decision chose, without analysis, between two policies of the Act. 371 U. S. 167. Likewise in *Sheridan* the Board chose, without analysis or even recognition that it was so doing, between the policy of promoting the rights of employees and the policy of promoting stability in collective bargaining relations.

In *Burlington Truck Lines, Inc.* this Court held that the agency practice failed to meet the standards of due process, and that it also failed to meet those standards as they are codified in the Administrative Procedure Act. 371 U. S. 167.

POINT III

The adoption and application of the *per se* rule approach to the instant case and like cases is improper; but even if it were held to be proper, the rule should have been applied prospectively.

The adoption and application of the *per se* rule approach to this case was improper because, where an employer withdraws from a multi-employer unit *because the union no longer represents his employees,* the employer is following the dictates of the National Labor Relations Act (29 U.S.C. Section 158(a)(2)) which are designed to insure the rights of his employees under that Act. 29 U.S.C. Section 157; *International Ladies' Garment Workers Union* v. *N.L.R.B.*, 366 U. S. 731 (1961).

A *per se* rule may be adopted with respect to the timing of withdrawal from multi-employer units, but any such rule

should except therefrom the situation which is present in this case. At the very least, the case should be remanded to the National Labor Relations Board for its consideration, in connection with its decision in this case, of the right of employees to determine their own bargaining representative. An examination of the decision of the Board in this case shows only a holding that, because the withdrawal was found by a *per se* approach to have been untimely, a multi-employer unit was appropriate. The Board first applied its new rule with the result that it held that Sheridan's employees as such had no right to choose their own union, instead of first considering the employees' rights and then determining if it was wise to create a rule which had the effect of depriving them of those rights. Nothing in the decision indicates that the Board attempted to balance the right of employees to choose their own collective bargaining representative against any other interest.

The emasculation in this case of such an important right as a result of the adoption and application of a drastic *per se* rule is further evidence in support of the court's comment at page 216 of *Retail Clerks Union No. 1550* v. *N.L.R.B.*, 330 F. 2d 21 (C.A.D.C., 1964) where withdrawal from a multi-employer unit was in issue:

> "In reaching this conclusion, the Board has adhered to the salutary practice it has established of examining these multi-unit situations on a case-by-case basis."

That general comment is concurred in specifically with respect to the facts of the *Sheridan* case by Chief Judge Lumbard who wrote in his dissent:

> "Neither potential instability of the bargaining process nor administrative convenience requires substituting a flat rule prohibiting withdrawal after negotiations have begun in place of an inquiry as to bad faith and possible harmful effects." (357 F. 2d 250)

In *Sheridan* the three member panel of the Board made a landmark change in Board law from the case-by-case approach applauded by the court to the per se method. It made that change unknowingly and without adequate consideration of the interests involved and without adequate consideration of various alternative courses of action. (See January 1967 University of Pennsylvania Law Review for a discussion of such interests and alternatives.)

Moreover, it was error to apply the new rule retroactively. In discussing the propriety of retroactive application of a new rule by an administrative agency, this Court established the criterion by which such application is to be judged. In *S. E. C.* v. *Chenery Corporation,* 332 U. S. 194 (1947) this Court wrote, at page 203:

> "But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law."

The Board's decision in this case is entirely absent of any designation of any mischief which its new rule is designed to frustrate. Only in its brief to the Court of Appeals did the Board assign a reason for its rule, namely: the rule is designed to prevent disruption of the bargaining process.

But as the dissents notes: "The withdrawal (in *Sheridan*) does not appear to have prejudiced the union in any manner . . ." 357 F. 2d 249. A collective bargaining agreement was reached between the multi-employer association and the union with no disruption of the bargaining process.

Thus, there is no mischief to balance against the "ill effect of the retroactive application". The retroactivity in this case is "the type of retroactivity which is condemned by law".

CONCLUSION

For all of the reasons set forth above this matter should be remanded to the National Labor Relations Board.

Respectfully submitted,

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